Laben Electric Company *and* International Brotherhood of Electrical Workers, Local 611, AFL–CIO. Case 28–CA–13370

April 9, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

On September 11, 1996, Administrative Law Judge Jay R. Pollack issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions[1] and briefs and has decided to affirm the judge's rulings, findings, and conclusions, and to adopt the recommended remedy and Order as modified.

We agree with the judge that the Respondent violated Section 8(a)(3) of the Act by laying off Richard McDermott and Leroy Chavez on May 3, 1995, because of their union activities. In his remedy, the judge recommended that McDermott and Chavez be made whole for any loss of earnings they may have suffered from the date of their layoffs until the date they would have been lawfully laid off from the Respondent's Pajarito School project due to lack of work. The General Counsel has excepted to this remedy, arguing that McDermott and Chavez should be granted the traditional make-whole remedy of offer of reinstatement and backpay.

We find that conditional reinstatement is an appropriate remedy for the unlawful layoffs herein, under the principles established in *Dean General Contractors*, 285 NLRB 573 (1987), and *Casey Electric*, 313 NLRB 774 (1994). In those cases, the Board declined to apply a precompliance presumption against reinstatement in the construction industry, holding that reinstatement and backpay issues should ordinarily be resolved by a factual inquiry at the compliance stage of the proceeding.

Consistent with those cases, we are including a conditional order of reinstatement that entitles the Respondent to avoid the reinstatement obligation and terminate the backpay obligation at the completion date of the project in question if the Respondent shows at the compliance stage that, under its established policies and practices, employees hired into positions like those held by McDermott and Chavez would not have been transferred or reassigned to another job after the project at issue ended. Here, the issue whether McDermott and Chavez would have been retained or laid off at the conclusion of the Respondent's project was not fully litigated at the hearing. We simply do not know now whether the Respondent would have transferred or assigned McDermott and Chavez elsewhere.[2]

Accordingly, we are modifying the recommended Order to provide for both a make-whole remedy and reinstatement, but the Respondent will have the opportunity at compliance to limit its remedial obligations by showing that McDermott and Chavez would not have been transferred to other projects.[3]

AMENDED REMEDY

Having found that the Respondent has violated the Act, we shall order the Respondent to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent unlawfully laid off Richard McDermott and Leroy Chavez, we shall order it to offer them reinstatement to the same or substantially equivalent positions at other projects as close as possible to Albuquerque, New Mexico. In addition, we shall order the Respondent to make them whole for any loss of earnings and other benefits they may have suffered as a result of the Respondent's unlawful discrimination against them, from the date of the layoff to the date that the Respondent makes them a valid offer of reinstatement. Such amounts shall be computed in the manner prescribed in *F. W. Woolworth*

[1] There are no exceptions to the judge's finding that the Respondent did not violate the Act by not hiring George Haney and George Romero.

[2] Although the judge found that the layoffs (from the Pajarito School project) would have occurred for economic reasons later in the month, we find that the record is far from clear on whether McDermott and Chavez would have been transferred or reassigned thereafter.

[3] The dissent confuses two separate issues. The first issue—the unfair labor practice issue—is whether the union activities of McDermott and Chavez motivated the Respondent to lay them off from the Pajarito School project approximately 10 days earlier than they would otherwise have been laid off due to lack of work. Our dissenting colleague joins us in adopting the judge's finding that the Respondent did indeed accelerate the layoff of the two employees because of their union activities in violation of Sec. 8(a)(3) and (1).

The second issue—the remedial issue—is whether, absent the discrimination against them, the Respondent "would have transferred or reassigned [the two employees] elsewhere" after completion of the Pajarito School project. *Dean General*, supra, 285 NLRB at 573–574 and fn. 9. Contrary to the dissent's assertion, the judge's finding on the unfair labor practice issue does not end the inquiry into the remedial issue. The judge's unfair labor practice finding establishes that by approximately May 12, 1995, the two employees would have been laid off from the Pajarito School project due to lack of work for them to perform there. The judge's unfair labor practice finding does not resolve the separate remedial question whether, in the absence of discrimination, the two employees would have subsequently worked for the Respondent at some other project. As explained above, we simply do not know the answer to that question. Therefore, as in *Dean General*, this issue is left to be resolved at the compliance stage of this proceeding, at which point the Respondent will have the opportunity to show that employees hired into positions like those held by McDermott and Chavez would not have been transferred or reassigned to another job after the Pajarito School project ended.

Co., 90 NLRB 289 (1950), and shall be reduced by net interim earnings, with interest as computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987). This portion of the remedy is subject to resolution at the compliance proceeding of the issues outlined in *Dean General Contractors*, supra. Consistent with that decision, the Respondent will have the opportunity in compliance to show that, under its customary policies and practices, the discriminatees would not have been transferred to another project after they were lawfully laid off from the one for which they were hired due to lack of work, and that the Respondent's obligation for backpay and reinstatement would therefore not extend beyond that date.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Laben Electric Company, Albuquerque, New Mexico, its officers, agents, successors, and assigns, shall take the action set forth in the Order as so modified.

1. Substitute the following for paragraph 2(b).

"(b) Within 14 days from the date of this Order, offer Richard McDermott and Leroy Chavez full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed."

2. Insert the following as paragraph 2(c) and reletter the remaining paragraphs accordingly.

"(c) Make Kevin Prendergast, Richard McDermott, and Leroy Chavez whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision, as modified by the amended remedy section of the Board's decision."

3. Substitute the attached notice for that of the administrative law judge.

MEMBER HIGGINS, dissenting in part.

I agree with the findings of my colleagues that the Respondent unlawfully accelerated the layoff of employees McDermott and Chavez. I dissent only from the application of the conditional remedy of *Dean General Contractors*, 285 NLRB 573 (1987).

As the majority indicates, *Dean* rejected a precompliance presumption against reinstatement in the construction industry. The *Dean* principle rejected the practice of assuming that construction industry employees would have been laid off at the end of a particular job. As the *Dean* majority stated "We simply do not know, as a factual matter" whether the discriminatees would have been transferred or reassigned in the absence of discrimination. However, in the instant case, we *do* know this fact. The judge found that the Respondent *accelerated* the layoff by effectuating it on May 3, rather than on or about May 12 when it otherwise would have occurred if there had been no union activity. Thus, we have a clear factual determination that the discriminatees would not have been transferred or reassigned even in the absence of union activity. In these circumstances, where the judge found only that there was an acceleration of a layoff, I would not permit relitigation of the issue of whether employment would have otherwise continued.[1]

[1] The majority asserts that I have confused two separate issues—the unfair labor practice issue and the remedial issue. I am aware of the analytical distinction between the two issues. However, this distinction does not preclude a situation where, because of the nature of the case, the resolution of the one issue is a resolution of the other. In the instant case, the judge found an unlawful acceleration of the layoff, i.e., that it occurred on May 3, rather than on or about May 12 *when it otherwise would have occurred.* Where, as here, the judge has resolved both issues, there is no reason to relitigate either of them.

Since the layoff would have occurred "on or about" May 12, I would leave to compliance the determination of the precise date.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT lay off employees because of their membership in or activities on behalf of any union.

WE WILL NOT refuse to consider for employment and/or refuse to hire employees because those employees are union members or affiliated with a union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Leroy Chavez and Richard McDermott full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed.

WE WILL, within 14 days from the date of the Board's Order, offer Kevin Prendergast full employment in the position for which he applied or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges.

WE WILL make Richard McDermott, Leroy Chavez, and Kevin Prendergast whole for any loss of earnings and other benefits suffered as a result of our discrimination against them, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful employment actions against Richard McDermott, Leroy Chavez, and Kevin Prendergast and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the actions will not be used against them in any way.

LABEN ELECTRIC COMPANY

Mitchell Rubin, Esq., for the General Counsel.
Nicholas J. Noeding, Esq. (Hinkle, Cox, Eaton, Coffield & Hensley), of Albuquerque, New Mexico, for the Respondent.
John L. Hollis, Esq., of Albuquerque, New Mexico, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge. I heard this case in trial at Albuquerque, New Mexico, on May 14–16, 1996. On October 13, 1995, International Brotherhood of Electrical Workers, Local 611, AFL–CIO (the Union) filed the charge alleging that Laben Electric Company (the Respondent) committed certain violations of Section 8(a)(3) and (1) of the National Labor Relations Act (the Act). The charge was amended on October 19 and November 29, 1995. On November 30, the Regional Director for Region 28 of the National Labor Relations Board issued a complaint and notice of hearing against the Respondent, alleging that the Respondent violated Section 8(a)(3) and (1) of the Act. The Respondent filed a timely answer to the complaint, denying all wrongdoing.

The parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. On the entire record, from my observation of the demeanor of the witnesses,[1] and having considered the posthearing briefs of the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a New Mexico corporation with a principal place of business in Albuquerque, New Mexico, and has been engaged as an electrical contractor in the construction industry. During the 12 months prior to the filing of the charge, the Respondent purchased and received goods and materials valued in excess of $50,000 from suppliers located in New Mexico, which suppliers in turn, purchased and received goods directly from suppliers located outside the State of New Mexico. Accordingly, the Respondent admits and I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background and Issues*

The Respondent is small nonunion electrical contractor located in Albuquerque, New Mexico. The Union has tried to organize the Respondent's employees for the past several years. In 1992, the Union lost a Board-conducted representational election. However, the Union has continued to attempt to organize the Company by sending union members to apply for work at the Respondent. The placing of union members in nonunion jobs for the purpose of organizing has become a common practice in the construction industry and is commonly referred to as "salting." See, e.g., *Iplli, Inc.*, 321 NLRB 463 (1996).

In the instant case, the Union sent union members to apply for work with the Respondent in April, September, and October 1995. These employees were not hired. The complaint alleges that in September and October, the Respondent failed to hire employees Kevin Prendergast, George Romero, and George Haney because the employees were identified as union supporters or members of the Union. The failure to hire the employees in April is not at issue. The General Counsel also alleges that the Respondent laid off employees Leroy Chavez and Richard McDermott in May 1995, in order to discourage its employees from joining the Union or engaging in other union activities.

The Respondent contends that Chavez and McDermott were laid off due to a lack of work. Further, the Respondent argues that there were no openings for electricians at the time that Prendergast, Haney, and Romero applied for work.

B. *The May Layoffs of Chavez and McDermott*

1. Facts

From approximately January to May 3, 1995, Leroy Chavez worked at the Respondent's Parajito School jobsite as a journeyman electrician. Richard McDermott worked as an apprentice under Chavez' direction. There was an apprentice to journeymen ratio of one-to-one. Mike Totzke was leadman or foreman over this job.[2] The electrical work at the Pajarito School jobsite was scheduled to be completed by April 12,

[1] The credibility resolutions have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). As to those witnesses testifying in contradiction to the findings here, their testimony has been discredited, either as having been in conflict with credited documentary or testimonial evidence or because it was in and of itself incredible and unworthy of believe.

[2] None of the parties contended that Totzke was a statutory supervisor.

1995. However, due to delays and change orders, work continued at the jobsite beyond April 12.

In early April, Chavez spoke with Ruben Romero, union business agent, about becoming a union member. Thereafter, in late April or early May, Romero asked Chavez to help try to organize the Respondent's electricians. Romero gave Chavez union authorization cards to distribute to his fellow employees. At that time, the Respondent employed Totzke, Chavez, McDermott, Robby Reinacher, vice president, superintendent, and foreman,[3] and Scott Davis, an apprentice assigned to work with Reinacher, to perform electrical work.[4]

On May 3, 1995, Chavez went to the Pajarito jobsite at 6:50 a.m., 10 minutes before the usual starting time, wearing an IBEW T-shirt and an IBEW baseball cap. Chavez handed union authorization cards and Romero's business card to McDermott and Totzke. For approximately 20 minutes, Chavez spoke to Totzke and McDermott about the benefits of union membership. At approximately 7:10 a.m., Totzke called Reinacher on his two-way radio. Totzke told Reinacher that Chavez had come to work wearing the union outfit and "that he was passing out Union cards and literature." Totzke said that Chavez was attempting to get Totzke and McDermott to join the Union. Reinacher told Totzke to ignore Chavez. A few seconds later, the voice of Phil Laben, the Respondent's president, came over the radio. Laben told Totzke, "get rid of him, we can use lack of production." Laben then told Totzke to go call him on the telephone first. Totzke told Chavez and McDermott to go to work.

Totzke then called Laben as he had been instructed to do. According to Totzke, whom I credit, Laben asked Totzke what was going on at the jobsite. Totzke answered that Chavez had come to work in his IBEW shirt and hat. Laben asked what time Chavez "started talking Union" and Totzke answered that Chavez began at 6:55 a.m.and continued until 7:05 a.m. Laben proposed that he would lay off Chavez instead of firing him. Laben explained that he would lay off McDermottt at the same time to make it look like a real layoff.[5]

At 3 p.m. that afternoon, Reinacher laid off McDermott. Reinacher told McDermott that work was slow and that he had to let McDermott go. He handed the apprentice his next to last paycheck. Reinacher then laid off Chavez. Reinacher told Chavez that he was being laid off due to a work slowdown and handed Chavez his last two paychecks.[6] Chavez asked Reinacher about two future projects, at the Technical Vocational Institute (TVI) and the Rio Rancho office building. Reinacher responded that those projects had been delayed and wouldn't be starting for months. Chavez next handed Reinacher a union authorization card and asked Reinacher if he wanted to join the Union. Reinacher reacted angrily and proclaimed that he'd "rather starve before he'd go union."

To support his theory of unlawful motivation, the General Counsel offered tesimony by Totzke that Laben had often expressed his hatred of the Union. Totzke also testified that Laben often stated that he would have noting to do with the Union and that he would close down the Company if he ever had to do anything with the Union. According to Totzke, Laben told Reinacher and Totzke that he would never hire anyone from the Union. Laben did not deny this testimony.

The Respondent claims that it laid off Chavez and McDermott for lack of work. The electrical work at the Pajarito jobsite was originally scheduled to be completed by April 12, 1995. Prior to their layoffs, both McDermott and Chavez asked Reinacher about the prospects of future work with the Respondent. These question were obviously prompted by the fact that work on the Pajarito jobsite was slowing down. Reinacher told the employees that he anticipated work opportunities at other jobsites but he was uncertain about the timing of these jobs. Reinacher told Chavez that the Respondent would keep Chavez busy if the TVI and Rio Rancho jobs were not ready when the Pajarito job was completed. In late April, the Respondent had four small jobs going in addition to the Pajarito jobsite. These jobs accounted for approximately 60 man-hours per week as opposed to over 600 man-hours per week for the Pajarito jobsite.

According to Laben, he decided to lay off Chavez and McDermott as opposed to Reinacher and Totzke who had longevity and supervisory responsibilty. I find that when layoffs were necessary, Reinacher as vice president and superintendent would have been retained to supervise whatever work remained. He would be the last person laid off. Davis as the apprentenice assigned to Reinacher would be the next to last person laid off. As Laben testified, Totzke would be the last laid off at the Pajarito jobsite.

For the 4-week period from May 3 to 30, 1995, the Respondent scheduled electricians for only 335 man-hours of work. Totzke worked at the Pajarito site until May 12, when he was laid off by Reinacher. In June, on all of the Respondent's jobsites combined, there was only a total of 291 man-hours of work for Reinacher and Davis, for an average of 35.6 hours per week for each electrician. The Respondent did not hire an additional electrician until October 16, 1995. Chavez testified that in September or October, he called Laben and asked whether the Respondent had any openings for him. Laben answered that he wasn't sure and would get back to Chavez in a week or two. Although Chavez left his phone numer with Laben, he never was contacted by the Respondent.

2. Analysis

In *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board announced the following causation test in all cases alleging violations of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation. First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. On such a showing, the burden shifts to the employer to demonstrate that the same

[3] The Respondent admits and I find that Reinacher is a supervisor within the meaning of Sec. 2(11) of the Act.

[4] The only other employees of the Company were its president, Phil Laben, and Eileen Devine, office secretary. Devine performs accounting and bookkeeping work, answers the telephone, and acts as a receptionist.

[5] Due to the apprentice to journeyman ratio then in effect, the Respondent could not continue to employ McDermott if Chavez was terminated. McDermott needed to work with another journeyman or be let go.

[6] One paycheck was for the pay period ending May 2. The second paycheck was for 1 day, May 3.

action would have taken place even in the absence of the protected conduct. The United States Supreme Court approved and adopted the Board's *Wright Line* test in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399–403 (1983). In *Manno Electric*, 321 NLRB 278 fn. 12 (1996), the Board restated the test as follows. The General Counsel has the burden to persuade that antiunion sentiment was a substantial or motivating factor in the challenged employer decision. The burden of persuasion then shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employees had not engaged in protected activity.

For the following reasons, I find that the General Counsel has made a strong showing that the Respondent was motivated by antiunion considerations in laying off Chavez and McDermott. First, the evidence establishes that as soon as Laben learned of Chavez' union organizing, he told Totzke to get rid of Chavez and that he could use lack of production as the reason. Chavez and McDermott, having heard these remarks, could only assume that the layoffs were motivated by Chavez' union organizing activities. When Totzke called Laben, Laben told Totzke that he would not fire Chavez but rather lay off Chavez and include McDermott in the layoff to make it look like a layoff for lack of work. Not only do Laben's statements establish that the Respondent was retaliating against Chavez because of Chavez' union activities but they also constitute an outright confession that he was attempting to disguise his action as a lawful layoff. *American Petrofina Co. of Texas*, 247 NLRB 183 (1980). The abruptness of the layoffs further supports the conclusion that the layoffs were unlawfully motivated. The employees were laid off without prior notice, in the middle of a workweek and pay period. Not only had the Respondent not given the employees prior notice but Reinacher had only recently assured Chavez that the Respondent would keep him busy if the Pajarito job ended before the TVI and Rio Rancho jobs started. Finally, Totzke continued to work on this jobsite until May 12. The timing of the layoffs, Laben's union animus, and Laben's admissions provide the necessary elements to establish a very strong prima facie case.

The burden shifts to the Respondent to establish that the same action would have taken place in the absence of the employees' protected conduct. I find that the Respondent has shown that economically motivated layoffs would have occurred in the absence of union activity and that the employees selected for layoff would have been selected based on an allocation of labor which had been determined prior to any union activity. However, I find that the economic layoffs of Chavez and McDermott were accelerated based on Chavez' union organizing.

First, the Pajarito job was slowing down. The job was coming to a point where it could be handled by Reinacher and his apprentice. By the middle of May, the Respondent no longer had the need for more than one journeyman and one apprentice electrician. Thus, Totzke was laid off on May 12. Thereafter, Reinacher and Davis were able to perform all the Respondent's electrical work at all of its jobsites, including the Pajarito jobsite. Second, as vice president, superintendent, and foreman, Reinacher would have been retained as the journeyman electrician when the work force was lawfully reduced on or about May 12. Davis would have been retained as the apprentice because he worked with Reinacher. Although Chavez, McDermott, and Totzke all testified that they were not impressed by Davis' work ethic, they all testified that Reinacher and Davis were a team and that Davis went everywhere that Reinacher went.

In conclusion, I find that the Respondent had lawful economic reasons for a layoff but that the layoff was accelerated based on the union activities. I find that the Respondent would have laid off Chavez and McDermott by the middle of May. However, the Respondent unlawfully accelerated its layoff of these two employees and laid them off on May 3. I cannot tell with certainty the day that these two employees would have been lawfully laid off. That fact appears to be solely within the knowledge of the Respondent. Based on the fact that Totzke was laid off on May 12 and that these two employees would not likely have been retained longer than Totzke, I find that absent the union activities Chavez and McDermott would have been permitted to work until approximately May 12, 1995.[7] Accordingly, I find that the Respondent violated Section 8(a)(3) and (1) of the Act by accelerating the layoffs of Chavez and McDermott because of their union activity. *Wisconsin Steel Industries*, 318 NLRB 212 (1995); *Eddylean Chocolate Co.*, 301 NLRB 887 (1991).

C. *The Failure to Consider the Applicants for Hire*

The General Counsel alleges that the Respondent failed to consider for employment or to hire the union electricians for work at its Albuquerque jobsites because of their affiliation with the Union. The Respondent contends that there were no openings when these union electricians applied for work.

On September 3, 1995, the Respondent ran an advertisement in the Albuquerque Journal for "ELECTRICIANS journeyman [with] license for commercial work." On Septenber 5, Kevin Prendergast, a member of the Union, went to the Respondent's office and filled out a job application. Prendergast wore a union T-shirt with a union emblem and "Local 11" and Albuquerque, New Mexicao" written on it. He also wore a an IBEW Local 11 baseball cap.

After Prendergast filled out the application, he handed the application to Laben. In filling out his job application, Prendergast listed his last three employers, all signatories to union agreements. As references, Prendergast listed two union business agents. Laben asked Prendergast what would he get if he called the references and Prendergast replied that he'd get the Local 611 office. Laben wrote the words "work 611 office" on Prendergast's application. Laben told Prendergast that the Respondent would be hiring the next week. Another electrician was not part of the Respondent's payroll until October 16. The Respondent did not contact Prendergast after September 5.

Laben testified that he did not offer Prendergast a job because he didn't need more manpower. However, Laben did offer a job to electrician David Larranaga on September 5.

Larranaga was sent to apply for work with the Respondent by Business Agent Romero. Larranaga did not identify himself as a union member. When Laben questioned Larranaga about one of his previous employers, Larranaga answered that he worked for that employer while it was a nonunion company. On September 6, Laben called Larranaga and of-

[7] The determination of the date that Chavez and McDermott would have been lawfully laid off is deferred to the compliance stage of these proceedings.

fered the electrician a job. Larranaga replied that he couldn't report to work so soon. Larranaga's job applications bear the comment "Phil hired to work, but this guy never showed up 9/18/95." Even after Larranaga failed to report for work, the Respondent did not offer Prendergast employment.

In late September, George Haney and George Romero, brother of Business Agent Ruben Romero, attempted to file job applications with the Respondent. George Romero was wearing a union button and union shirt. Laben told Romero and Haney that the secretary was not at work and that he did not have any job applications available. Laben invited the employees to come back at a later time. Romero asked Laben for a telephone number to call and Laben gave him a business card.

On or about October 6, 1995, Romero called the Respondent's office and spoke with Eileen Devine, office secretary. Romero and Haney testified that Romero said the employees wanted to file job applications and that Devine asked whether Romero had a state license, if he was presently employed, and if (he) was a union member. According to Romero he answered "[Y]es" to all these questions. Devine denied asking these questions and specifically denied asking whether Romero was a union member. Based primarily on demeanor and my impression that Romero and Haney were attempting to make a case against the Respondent, I credit Devine's testimony over that of Romero and Haney. I found Devine to be a credible witness who appeared to attempt to truthfully recite the facts even if unhelpful to her Employer's case.

On October 6, an hour after speaking to Devine, Romero and Haney drove to the Respondent's office. While Romero and Haney were filling out job applications, Laben was interviewing another electrician, Terry Richardson. Romero and Haney saw Laben and Richardson come out of Laben's office and shake hands. Laben had just offered Richardson employment as a journeyman electrician. When Laben next directed his attention to Romero and Haney, he asked if they hadn't been to his offices before and the employees answered that they had. Haney asked Devine how long the application would be good for and was told a week. Haney then asked if he had to return in a week and was told that the application was good for a month. Devine told the two employees that they would not be interviewed but their applications would be kept. The hiring of Richardson filled the one position the Respondent had for a journeyman electrician and Romero and Haney were not later contacted by the Respondent.

In his job application, George Romero listed three previous employers, all of whom were union contractors. Further, Romero listed Ruben Romero as a reference and indicated that Ruben was his brother. The job application filed by Haney listed three previous employers all of whom were signatory to union contracts. In addition, Haney listed Ruben and George Romero as references.

Laben testified that he did not hire Romero or Haney because he had just made an offer to Richardson while they were filling out their applications. The testimony of Devine, Romero, and Haney also appears to establish that Laben interviewed and offered Richardson employment while Romero and Haney were filling out applications and waiting for Laben. Richardson did not start working for the Respondent until October 16. The Respondent did not hire another electrician until November 21. On or about December 5, the Respondent hired another apprentice electrician. This electrician was referred by the Independent Electrical Contractors apprentice program, the exclusive source for all the Respondent's apprentices. Finally, on December 13, the Respondent hired another electrician.

In *Wright Line*, supra, the Board announced the following causation test in all cases alleging violations of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation. First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. On such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The United States Supreme Court approved and adopted the Board's *Wright Line* test in *NLRB v. Transportation Management Corp.*, supra at 399–403.

As the Board stated in *Big E's Foodland*, 242 NLRB 963, 968 (1979):

> Essentially, the elements of a discriminatory refusal to hire case are the employment application, the refusal to hire each, a showing that each was expected to be a union supporter or sympathizer, and further showings that the employer knew or suspected such sympathy or support, maintained an animus against it, and refused to hire the applicant because of such animus.

The General Counsel argues that this is a case where the Respondent failed to even consider the applicants for employment, and/or discriminatorily refused to hire the employees because of their union affiliation. The elements necessary to establish a violation are not significantly different. See, e.g., *Ultrasystems Western Constructors v. NLRB*, 18 F.3d 251 (4th Cir. 1994); *KRI Constructors*, 290 NLRB 802 (1988). As will be discussed more fully here, the General Counsel must establish that these applications were not considered for reasons proscribed by the Act. The small size of the Company and its lack of recordkeeping make determining the Respondent's motive difficult.

In this case, there is no dispute that the employees filed applications and were not hired. The Respondent argues that it did not have knowledge of the union affiliation of the applicants. I find otherwise. First, the employees wore union caps and buttons. Second, the employees' job applications showed that they had worked for union contractors in the area. Laben's testimony that he was unaware of the union status of these union contractors is simply not credible. Further the applicants used union business agents as references. The evidence is clear that Laben knew that Prendergast, Haney, and George Romero were union members or affiliated with the Union.

However, the General Counsel must establish unlawful motive or union animus as part of his prima facie case. If the unlawful purpose is not present or implied, the employer's conduct does not violate the Act. *Abbey Island Park Manor*, 267 NLRB 163 (1983); *Howard Johnson Co.*, 209 NLRB 1122 (1974). However, direct evidence of union animus is not necessary to support a finding of discrimination. The motive may be inferred from the totality of the circumstances proved. *Fluor Daniel, Inc.*, 311 NLRB 498 (1993); *Associacion Hospital del Maestro*, 291 NLRB 198,

204 (1988). Here, the General Counsel has established that the Respondent unlawfully accelerated the layoffs of Chavez and McDermott. Further, the General Counsel offered strong evidence that Laben harbored animus against the Union. Laben told Totzke that he would never hire anybody from the Union and that he would close his business rather than have anything to do with the Union.

Under *Wright Line*, supra, the burden shifts to the Respondent to establish that the same action would have taken place in the absence of the employees' protected conduct. The Respondent claims that at the time that Prendegast, Haney, and Romero applied for work, the Respondent did not have available positions for employment.

First, 2 days before Prendergast applied for work, the Respondent ran an advertisement for a journeyman electrician. Consistent with the testimony of office secretary Devine, I find that Laben would not have placed this advertisement if he were not looking to hire. Further, Devine testified that Laben asked to look at job applications during this time period. Most important, Laben made a job offer to Larranaga who filed an application on the same date as Prendergast. When Larranaga did not appear for work, the Respondent considered him a no show on September 18. However, the Respondent made no attempt to contact Prendergast.

I do find that at the time that Haney and Romero applied there were no openings because the Respondent had just hired Richardson. However, that does not conclude the matter. First, had the Respondent not unlawfully refused to hire Prendergast, there would have been no position for Richardson. Further Chavez, who had his layoff unlawfully accelerated in May, had sought recall in September or October. Based on the facts before, I find that absent discrimination, Prendergast would have been offered employment in September. If Prendergast accepted that offer, it would follow that there would be no position available when Chavez sought reemployment or when Romero and Haney applied for work. Thus, it appears that Prendergast, Chavez, and Richardson would have been hired before Romero and Haney. Thus, I find that Romero and Haney would not have been hired in any event.

III. THE REMEDY

Having found that the Respondent engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and that it take certain affirmative action designed to effectuate the policies of the Act. Accordingly, the Respondent will be ordered to offer Kevin Prendergast immediate reinstatement to the position from which he was unlawfully excluded from employment, dismissing, if necessary, anyone who may have been hired or assigned to perform the work he would have been performing if he had not been unlawfully denied employment or, if that position no longer exists, to substantially equivalent position, without prejudice to his seniority or other rights and privileges. Additionally, the Respondent shall be required to make Prendergast whole for any loss of earnings he may have suffered by reason of the discrimination against him, with backpay to be computed on a quarterly basis, making deductions for interim earnings, *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and with interest to be provided in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The Respondent will also be ordered to wake whole Leroy Chavez and Richard McDermott for any losses suffered by reason of the unlawful acceleration of their layoff. Backpay will be computed from May 3, 1995, the date of their layoff, until the date that they would have been lawfully laid off due to lack of work.

CONCLUSIONS OF LAW

1. The Respondent, Laben Electric Company, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. By refusing to hire Kevin Prendergast because of his membership in, or activities on behalf of the Union, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

3. By accelerating the layoffs of employees Leroy Chavez and Richard McDermott because of their union activities, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

4. The above unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[8]

ORDER

The Respondent, Laben Electric Company, Albuquerque, New Mexico, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Laying off employees because of its employees membership in or activities on behalf of any union.

(b) Refusing to consider for employment and/or refusing to hire employees because those employees are union members or affiliated with a union.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Kevin Prendergast full reinstatement to the job for which he would have been hired or, if that job no longer exists, to a substantially equivalent position, without prejudice to the seniority or any other rights or privileges he would have enjoyed had he been hired in September 1995.

(b) Make whole Kevin Prendergast, Leroy Chavez, and Richard McDermott for any losses incurred as a result of the Respondent's unlawful discrimination against them, as provided in the remedy section of this decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful layoffs and unlawful refusal to hire, and within 3 days thereafter notify Chavez, McDermott, and Prendergast in writing that this has been done and that the discipline found unlawful will not be used against them in any way.

[8] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Albuquerque, New Mexico facilities copies, in English and Spanish, of the attached notice marked "Appendix."[9] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure the notices are not altered, defaced or covered by other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees employed by the Respondent at any time since May 3, 1995.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."